88-816

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1988

CITY OF NEW KENSINGTON and WILLIAM DLUBAK, in his official capacity,

Petitioners,

v.

MAMIE HORTON, individually and as Administratrix of the Estate of Douglas Powdrill,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a law enforcement officer's mere knowledge of a victim's plight, in the early and ambiguous stages of what ultimately became a criminal episode, is sufficient:

   A. To create a duty, based upon the due process clause of the fourteenth amendment, to protect that individual from harm at the hands of third parties; and

   B. If such a duty exists, whether the individual may maintain an action, under 42 U.S.C. § 1983, against the officer and his municipal employer for negligent deprivation of a constitutionally protected right whenever the officer responds inadequately to the situation?

II. Whether the existence of a written policy can create municipal and official liability for the negligent omissions of a law enforcement officer during the early and ambiguous stages of what ultimately became a criminal episode:

   A. When the plain language of the policy does not apply to the circumstances confronting the officer in the field; and

   B. The record is otherwise devoid of evidence that the officer's failure to act was motivated by the written policy?

LIST OF PARTIES

Milton Patrick was a named plaintiff in the District Court (A. 1), but he did not appeal from the judgment entered against him. (A. 13, 15).

Charles "Pope" Flenory, Jr. was named as a defendant in his individual capacity, as proprietor of the Cash Club, and "as a defacto Chief of Police" for the City of New Kensington. (A. 1). On June 13, 1984, a default judgment was entered against him. (A. 3). On November 8, 1984, the claim against him as defacto police chief was stricken. (A. 6). Flenory did not seek to open the default judgment and has filed no appeal. (A. 3-15).

William Dlubak, one of the petitioners, was sued in his individual and official capacity. (A. 1). A judgment was entered in his favor as to the claim against him individually (A. 13), but no appeal was filed by the plaintiffs (A. 13-15). The judgment against him in his official capacity was appealed. (A. 15).

Joseph Mangione, Robert Kowalkowski, Edward McAfoose and John J. Monaco were each sued in their individual and official capacities. (A. 1). Judgments were entered in their favor. (A. 13). No appeal was taken from those judgments. (A. 13-15).

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REFERENCE TO OPINIONS OF COURTS BELOW

None of the opinions by the courts below are officially reported. Relevant opinions are set forth in the appendix.

STATEMENT OF JURISDICTION

The judgment to be reviewed was entered by the United States Court of Appeals for the Third Circuit on August 18, 1988. No petition for rehearing was filed and no order has been entered extending the time within which to petition for certiorari. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

U.S. Const., amendment 14:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to

the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

I. Summary of the Proceedings Below

This civil rights case was brought in the United States District Court for the Western District of Pennsylvania to recover for the death of Douglas Powdrill and injuries to Milton Patrick. (A. 1). Both men were beaten by private parties within a private club located in the City of New Kensington. (A. 1080). The defendants included the City of New Kensington, various officials and police officers of the city (all of whom were sued in their individual and official capacities), and several private parties. (A. 1, 1081). Although an assortment of civil rights and common law claims were pled, the District Court eliminated various claims on summary judgment motions filed by the City and its employees. (A. 11). At trial, numerous other claims were resolved by the entry of directed verdicts. (A. 484-517, 1081).

The only claims submitted to the jury pertained to the liability of the City and its police officers for failing to prevent the beatings. (A. 1081-82). The claims were predicated upon an alleged policy of the City police not to intervene in matters at private clubs. (A. 1081-82). The jury found in favor of all of the defendants with respect to the claims of Milton Patrick. (A. 1083). With two exceptions, the jury also found in favor of all of the defendants with respect to the claims relating to the death of Douglas Powdrill. (A. 625-26). The jury returned verdicts against the City of New Kensington and Sergeant William Dlubak, in his official capacity, with respect to this death. (A. 625-26). The jury, however, was unable to agree upon an

amount of damages. (A. 628-29). The court then declared a mistrial as to those two claims. (A. 632, 1084). Judgments were rendered for the defendants in all other respects. (A. 13-14).

After denying the motions for judgment n.o.v. presented by the City of New Kensington and Sergeant Dlubak and after denying the plaintiff's motion for new trial (A. 13-14), the court *sua sponte* entered an order relisting the two outstanding claims for a new trial as to damages only (A. 14, 1079, 1084). The City of New Kensington and Sergeant Dlubak then requested a new trial as to both liability and damages. (A. 14, 1090-95). The court denied their motion. (A. 14, 1098). Despite the defendants' objections, the court ordered the parties to try the case as to damages only. (A. 1089).

The second jury eventually returned a verdict in favor of Mamie Horton, as Administratrix of the Estate of Douglas Powdrill, in the amount of $65,899.00. (A. 1099). Judgments were entered against the City of New Kensington and Sergeant Dlubak in his official capacity. (A. 15, 1100). The City and Sergeant Dlubak appealed. (A. 15, 1101-02). The United States Court of Appeals for the Third Circuit affirmed. (A-3). This petition followed.

II. The Facts

On November 10, 1982, Douglas Powdrill died as a result of a beating inflicted by third persons in the Cash Club, a private club located in the City of New Kensington. (A. 1080).

Several days before the beating, the Cash Club was burglarized. (A. 977-79). On the morning of November 10, 1982, the New Kensington police were notified of the burglary. (A. 974-77). A detective, Sergeant William Dlubak,

went to the club to investigate the burglary. (A. 974). Sergeant Dlubak performed an initial investigation of the burglary, including a discussion with Douglas Powdrill. (A. 977-79). Powdrill denied participation in the theft of record albums (A. 979), and purportedly asked to be taken from the club (A. 133). Although Powdrill had tears in his eyes, Sergeant Dlubak did not believe that Powdrill was in any danger. (A. 979, 1006-12). Sergeant Dlubak left the scene, leaving Powdrill in the company of Charles Flenory, Jr., the owner of the Cash Club and a former New Kensington policeman. (A. 981). In accordance with Mr. Flenory's request, Sergeant Dlubak did not file an offense report. (A. 985).

Cash Club personnel apparently suspected Douglas Powdrill and Milton Patrick of the burglary. (A. 870-71). Sergeant Dlubak was not told of this, however. (A. 870-71, 977). Later in the day, these individuals were beaten in the club by club personnel. (A. 765-67).

At about the same time as the beatings were taking place, several youths approached another policeman and told him that there was some type of trouble at the Cash Club. (A. 1031). The officer and another policeman went to the Cash Club and inquired. (A. 1032). They were met at the door by Mr. Flenory, who advised them that there was no trouble. (A. 1032). Mr. Flenory then stated that the "trouble" may have been the burglary which Sergeant Dlubak investigated that morning. (A. 1032-33). These two policemen left the premises. (A. 1033).

Plaintiffs asserted that the City of New Kensington had an explicit policy or custom which encouraged these

acts.[1] (A. 1081-82). In particular, they claimed that Sergeant Dlubak failed to remove Douglas Powdrill from the Cash Club because of a policy of non-intervention at private clubs. (A. 513). Section 6.57 of the New Kensington police manual provided:

> **Request for Service from Private Club**
>
> A. When a call is received from a private club, where the complaint is intoxication, the club should be tactfully encouraged to handle its own problem.
>
> B. Such a club is not a public place, and arrests are invalid.

(A. 1067).

Plaintiffs presented no direct evidence that Sergeant Dlubak's actions were motivated by the written policy set forth above. The defendants, however, presented testimony that Sergeant Dlubak's actions had nothing whatsoever to do with the policy (A. 1014), that the policy was a rational attempt to regulate police activity (A. 539-42), and that the policy was limited only to claims of public intoxication in the private clubs of New Kensington (A. 550).

At the close of the plaintiff's evidence, the defendants requested directed verdicts. (A. 484-517). The request as to the section 1983 claim was refused on the basis that the alleged policy, section 6.57, could be interpreted as preventing the police from not taking someone from a private club. (A. 513).

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[1]Because the jury exonerated Officer Kowalkowski and Lt. Mangione, the policemen who responded to the purported "trouble" at the Cash Club (A. 625-26), the focus is now and exclusively upon the acts or omissions of Sergeant Dlubak when he first investigated the burglary.

The court submitted the plaintiff's liability theory to the jury even though there was no hint of a special relationship between Sergeant Dlubak and Powdrill and no proof of a causal connection between the investigation performed by Sergeant Dlubak and the purported policy of non-intervention at private clubs. (A. 513). The charge stated, in pertinent part:

> You must also determine whether any of the individual police officers is liable in his official capacity. Under this standard the plaintiffs must prove by a preponderance of the evidence that a policy of the City of New Kensington played a part in the deprivation of Douglas Powdrill's or of Milton Patrick's constitutional rights.
>
> That is, as to each individual defendant, the plaintiffs must establish:
>
> First, that the acts of that defendant, in his official capacity, either implemented or executed a policy of the City of New Kensington;
>
> And, second, that the actions of that defendant in implementing or executing the policy caused a denial of the constitutional rights of Douglas Powdrill or Milton Patrick.
>
> In order to establish the liability of the City of New Kensington itself, plaintiff must establish:
>
> First, that an employee of the city implemented or executed a city policy;
>
> And, second, that this conduct on the part of the city's employee caused the deprivation of Douglas Powdrill's or Milton Patrick's constitutional rights.

> You will have to determine whether the conduct of any of the defendants acting either in their individual capacities or in their official capacities caused a violation of Douglas Powdrill's or Milton Patrick's constitutional rights.
>
> Under the Fourteenth Amendment of the United States Constitution, an individual has a constitutionally protected interest in his personal security; that is, the right to be free of bodily harm inflicted by another individual. The parties have stipulated or agreed that Douglas Powdrill and Milton Patrick were beaten at the Cash Club on November 10, 1982, and that Douglas Powdrill died as a result of head injuries received in the beating. It will be your job to decide whether any of the defendants in this case caused the deprivation of Douglas Powdrill's or Milton Patrick's constitutional rights.

(A. 587-89).

As noted above, there was no individual liability on the part of Sergeant Dlubak. (A. 625). The jury did, however, find him to be liable in his official capacity and it also found the City of New Kensington to be liable. (A. 625-26). The second jury eventually returned a damages award of $65,899. (A. 1099).

BASIS FOR FEDERAL JURISDICTION

The federal courts have subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343. The appeal was taken from a final order, pursuant to 28 U.S.C. § 1291.

ARGUMENT

I. Certiorari should be granted because this Court has yet to decide whether the failure of a law enforcement official to intercede in an evolving criminal episode is actionable, under section 1983, when a person is injured as an alleged result of the officer's failure to respond appropriately.

In this case, the District Court allowed the jury to decide whether the failure of a New Kensington police officer to intervene—ostensibly on the basis of some purported government policy—subjected Douglas Powdrill to a deprivation of life without due process of law. However, this Court has yet to decide whether, in a constitutional sense, a municipality has a duty to provide adequate police protection and whether the failure to do so is actionable under 42 U.S.C. § 1983. Only if such a duty exists can there be liability for failure to act. At the heart of this issue lies a fundamental question of constitutional jurisprudence: is the constitution a charter of negative or positive liberties? A plain reading of the fourteenth amendment reveals that our founding fathers were concerned about state oppression of its citizenry and that they did not mandate social programs for the benefit of their constituents. Whether a state must provide a police force, fire department or squadron of emergency medical technicians are and ought to be matters left to the political and judicial forums of our states. Yet the expansive notion of the due process clause embraced by the courts below would allow a federal court, in a 1983 case, to subordinate state law and state policies to unarticulated, minimum federal standards. This unprecedented intrusion upon the states ought to be reviewed by this Court.

II. Certiorari should be granted because the decisions of the courts of appeal are now in conflict as a result of the Third Circuit's decision in this case.

A majority of the circuits subscribe to the view that the failure of a state to protect people from private violence, or other untoward events not attributable to agents of the state, is not a denial of a constitutionally protected liberty or property interest. *See, e.g., Estate of Gilmore v. Buckley,* 787 F.2d 714 (1st Cir.), *cert. denied,* 479 U.S. 882, 107 S.Ct. 270, 93 L.Ed.2d 247 (1986); *Love v. King,* 784 F.2d 708 (5th Cir. 1986); *Janan v. Trammell,* 785 F.2d 557 (6th Cir. 1986); *DeShaney v. Winnebago County Department of Social Services,* 812 F.2d 298 (7th Cir. 1987), *cert. granted,* ___ U.S. ___, 108 S.Ct. 1218, 99 L.Ed.2d 419 (1988); *Escamilla v. City of Santa Ana,* 796 F.2d 266 (9th Cir. 1986); *Wright v. City of Ozark,* 715 F.2d 1513 (11th Cir. 1983); *Washington v. District of Columbia,* 802 F.2d 1478 (D.C. Cir. 1986). However, the Third Circuit summarily concluded that Sergeant Dlubak did owe Douglas Powdrill a duty to protect him from attack by third parties. In so holding, the Third Circuit perpetuated its minority view, a position which should now be rejected by this Court.

The conflict between this case and *Escamilla,* decided by the Ninth Circuit, is acute. *Escamilla* rejected a 1983 claim brought by the survivors of a woman shot in a bar. They attributed her death to the failure of undercover policemen to intercede in a bar fight. The officers were on the premises to inspect for liquor law violations when they observed a fight brewing, saw one of the actors to be carrying a gun, and overheard him telling a friend to get a weapon. They chose a passive role by calling for uniformed assistance. Moments later, two fights broke out, both of

which were punctuated by gunfire. Although no one was hurt during the first fight, the second volley of shots struck a bystander. While the court recognized that but for the officers' failure to act promptly, the bystander would not have been shot, 796 F.2d at 268, it affirmed a grant of summary judgment to the municipality and its lawmen, *id.* at 270. The court reasoned that their failure to act at the scene of the crime was not a denial of due process because the undercover officers did not create or exacerbate the danger, *id.* at 269, and there was no custodial or other relationship creating a duty to protect the victim, *id.* at 269-70. The court concluded that the claim amounted to mere negligence which was no longer actionable under section 1983. *Id.* at 270 (citations omitted). *See also Love v. King, supra* (negligence of officer in failing to prevent enraged husband from entering a third person's house and shooting his wife and her paramour would not justify recovery under section 1983; directed verdicts for officer and municipality affirmed); *Dudosh v. City of Allentown,* 629 F. Supp. 849 (E.D. Pa. 1985) (negligence of officers in handling complaint of woman, who had an order under protection from abuse act, about the presence of an unwanted intruder in her apartment would not warrant a recovery under section 1983 due process claim; summary judgment granted to city and policemen).

This case also conflicts with *Reiff v. City of Philadelphia,* 471 F. Supp. 1262 (E.D. Pa. 1979), in which a patron in a store alleged that her paralyzing gunshot wound during a robbery was attributable to the Philadelphia Police Department's "policy of not responding to calls for assistance unless and until a crime has actually been committed." *Id.* at 1264. After concluding that the city had no constitutionally-based duty to provide adequate police

protection, *id.* at 1265-66, the court stated that pursuit of such a policy may be unwise but it was not unconstitutional:

> The plaintiff's allegation that the Police Department pursued a policy of not responding to calls for assistance unless and until a crime was actually committed or her allegation that the City failed to provide adequate police protection in a high crime area might well support a claim that such a policy is unwise, but such allegations do not rise to the level of a constitutional violation.

Id. at 1266. Thus, the court dismissed her complaint.

Even if the inactivity of Sergeant Dlubak were motivated by the alleged policy of the City of New Kensington to refrain from acting upon complaints at private clubs, there can be no relief under section 1983 for this death. Sergeant Dlubak did not create or exacerbate the allegedly dangerous condition. (A. 1006-12). At most he can be charged with failing to exercise due care in investigating a crime, the burglary at the Cash Club. When he arrived at the scene, it was peaceful; there was no criminal activity afoot; Douglas Powdrill had not been harmed; and there were no threats of imminent violence. (A. 1006-12). Mere mistakes of judgment in responding to evolving crimes will not support a 1983 claim. *See, e.g., Escamilla, supra; Love, supra. A fortiori,* when there is no crime in progress, the officer in the field should be held to a lesser standard and his failure to anticipate the criminal act should not be considered a denial of due process. *Cf. Davidson v. Cannon,* 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986). Moreover, Douglas Powdrill's discussion with Sergeant Dlubak about a past crime created no special relationship between them which could give rise to a due process claim

upon his demise. *See Bernstein v. Township of Lower Moreland,* 603 F. Supp. 907 (E.D. Pa. 1985) (survivors of witness who agreed to testify in a criminal prosecution in exchange for grant of immunity could not recover when witness was killed by accomplices). The actions of Sergeant Dlubak—even if undertaken pursuant to a policy of non-involvement, *see, e.g., Reiff*—simply will not support a due process claim.

The District Court should not have submitted the 1983 claim to the jury. Douglas Powdrill was the unfortunate victim of a criminal attack. The City of New Kensington and its police officer cannot be held liable for his death because no governmental act deprived him of due process of law. There was no showing of a special duty nor of a special danger. While hindsight may suggest a lack of due care by Sergeant Dlubak, the alleged failure to escort Douglas Powdrill from the Cash Club is not actionable under section 1983. Even if Sergeant Dlubak's actions were pursuant to a policy of non-intervention, no due process claim could be sustained. Therefore, the Third Circuit's affirmance was contrary to the prevailing view.

III. Certiorari should be granted because the Third Circuit's unprecedented adoption of the special relationship doctrine as the test for determining whether an actionable duty exists casts too wide a net for potential civil rights liability relating to the failure to protect against harms inflicted by third parties.

The District Court and the Third Circuit relied upon *Estate of Bailey v. County of York,* 768 F.2d 503 (3d Cir. 1985)—a case expressly rejected by *DeShaney* and *Estate of Gilmore*—to hold that a special relationship existed

between Douglas Powdrill and Sergeant Dlubak. According to the Third Circuit in *Estate of Bailey*, factors to be considered in determining whether a special relationship exists include

> whether the victim or perpetrator was in legal custody at the time of or prior to the incident; whether the state had expressly stated its desire to provide affirmative protection to a particular class or specific individuals; and whether the state knew of the victim's plight.

768 F.2d at 509 (citation omitted). This test, as articulated by the Third Circuit but not yet adopted by this Court, sweeps much too broadly in the context of law enforcement related injuries.

The folly of the Third Circuit's view is readily apparent. Whenever a police officer knows of a victim's plight, the failure to rescue the victim or otherwise to protect him from harm creates potential liability under section 1983. Under such a rule, a victim who identifies himself in a hurried call to a distant police station sets the stage for recovery when the police do not timely respond to his call for help. If reporting a crime or suspected crime will trigger a section 1983 claim, the special relationship doctrine becomes meaningless as a standard by which the liability of law enforcement officials can be measured. Indeed, the Seventh Circuit, in *DeShaney*, and the First Circuit, in *Estate of Gilmore*, rejected the Third Circuit's expansive view. According to *DeShaney*, there is no constitutional basis to afford protection to someone occupying a special relationship to the state. Moreover, the Seventh Circuit was well aware of the increased cost of providing social services where the special relationship test so easily satisfied. Certiorari should be granted so that this case can be decided as a companion to *DeShaney*.

IV. Certiorari should be granted because the question of municipal and official liability for a policeman's failure to respond to an evolving criminal episode is an issue of extreme importance to all law enforcement agencies and governmental units.

The entire law enforcement community and all levels of government share an interest in the outcome of this appeal. If section 1983 liability can be imposed for failing to respond to a call for assistance, the scope of services provided must be greatly expanded, with a concomitant increase in the cost of providing additional services. Whether to undertake to provide police or other types of essential governmental services will no longer be a question for the political and administrative forums of our states and municipalities. Instead, these vital fiscal and public policy questions will be aired before and decided by our federal judges and juries. The importance of this issue to the law enforcement agencies and governmental unites warrants further appellate review.

V. Certiorari should be granted because this case affords the Court an opportunity to clarify the causal connection which must be shown and to establish the quantum of evidence which must be presented in order to prove that an alleged policy of non-intervention was the moving force behind any constitutional violation for failure to act.

Even if the plaintiff established a policy or custom of municipal inaction, the judgment rendered against the City of New Kensington and Sergeant Dlubak in his official capacity must be reviewed and set aside because there was no proof that the purported policy was the moving force behind the alleged constitutional violation. Because

municipal liability under section 1983 may not be predicated upon a respondeat superior theory, *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), imposes such liability only when the constitutionally offensive acts are taken in furtherance of some municipal policy or custom. *Milligan v. City of Newport News*, 743 F.2d 227, 229 (4th Cir. 1984). Likewise, claims against a government official, in his official capacity, must be causally connected to the alleged policy. *Clay v. Conlee*, 815 F.2d 1164, 1170 (8th Cir. 1987). This case will enable the Court to address, for the first time, issues regarding proof of causation between a governmental omission and an alleged policy favoring non-intervention. Of particular importance will be this Court's assessment of the minimum quantum of evidence necessary to carry the plaintiff's burden of proof.

In *Milligan*, an automobile accident victim brought a 1983 action for injuries she allegedly received as a result of the police officers' failure to recognize her need for prompt medical attention. The court affirmed the dismissal of her complaint because there was no allegation that the policy was the moving force in causing her injuries. 743 F.2d at 231. In so holding, the court stated:

> Furthermore, even where such a "policy" of municipal inaction might be inferred, it must still be shown to have been the "moving force of the constitutional violation" specifically charged in order to create municipal liability. *Polk County v. Dodson*, 454 U.S. 312, 326, 102 D.Ct. 445, 454, 70 L.Ed.2d 509 (1981). This is to say that while a municipality's "policy" of inaction need not be found to have effectively commanded the particular violation, it must be of such a character that municipal employees could reasonably infer from it tacit approval of the conduct in issue. For only so could the requisite causal connection between

> policy and constitutional deprivation be found. *See Wellington*, 717 F.2d at 936 ("tacit authorization" required as basis for requisite causal connection). From this, it follows that municipal liability may not be rested simply upon a failure to adopt policies that in retrospect can be seen to be a means by which particular unconstitutional conduct of its employees might have been averted. *See, e.g., Dodson*, 454 U.S. at 326, 102 S.Ct. at 454.

Id. at 230 (citations omitted). The court also stated that there was no allegation of a known course of conduct having a manifest potential for causing a constitutional deprivation to an identifiable group of persons occupying a special relationship to the state—presumably all accident victims in the area—and the plaintiff could not rely upon a *post hoc* analysis to identify the alleged group of affected individuals. *Id.* at 230 & n.2. Finally, the court noted that, "[a]t most, the complaint asserts liability on the theory that the City might have, but did not, reduce the risk of harm to [plaintiff] from the negligent, though well-intended acts of those of its employees who attempted to render aid at the scene of the accident." *Id.* at 231.

The lower courts' holdings conflict with *Milligan* because there was no proof in this case that the purported policy of non-intervention caused a constitutional deprivation to Douglas Powdrill. There was no evidence that Sergeant Dlubak relied upon the purported policy as tacit approval for his conduct; indeed, he denied that the fact that the Cash Club was a private club affected his actions in any way. (A. 1014). *See, Clay, supra.* The policy was not unconstitutional on its face and it had a rational relationship to a legitimate government interest, the orderly administration of police work. *See Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983). Sergeant Dlubak responded to the call for assistance at the Cash Club. (A.

974). There was no crime in progress; there was no basis for him to believe that any criminal activity was about to occur; there was no basis for him to believe that Douglas Powdrill was in jeopardy of a criminal attack. (A. 1006-12). Moreover, there was no probable cause for Sergeant Dlubak to take Powdrill into custody. (A. 983, 988-99). Instead, the evidence was that Douglas Powdrill was beaten after the policeman left the scene. (A. 765-67). At most, this evidence showed that Sergeant Dlubak may have been negligent in conducting his investigation which, of course, could not give rise to a section 1983 due process claim. In short, there was no plausible connection between the municipal policy and the death of Douglas Powdrill.

VI. Certiorari should be granted because the imposition of municipal and official liability when there is no finding of individual liability creates a conflict with prior cases.

The absence of a causal connection between the purported policy and the alleged constitutional deprivation is magnified by the jury's exoneration of Sergeant Dlubak in his individual capacity. "Suits against officials in their individual capacity 'seek to impose personal liability upon a government official for actions he undertakes under color of state law.'" *Clay v. Conlee*, 815 F.2d at 1169 (citation omitted). To establish that liability, plaintiff must show that the official, while acting under color of state law, caused a deprivation of a federal right. *Id.* at 1169-70. On the other hand, a 1983 action against a government official, in his official capacity, is tantamount to a claim against the public entity and thus requires the plaintiff to prove more than that his rights were violated by the named individual defendant. *Id.* at 1170. Thus, the plaintiff in an official capacity case, as well as in a claim against the municipality directly, must show that the entity was the moving force

behind the violation; that is, the entity's policy or custom must have caused the violation and must be affirmatively linked to it. *Id. City of Los Angeles v. Heller,* 475 U.S. 796, 798-99, 106 S.Ct. 1571, 1573, 89 L.Ed.2d 806, 810-11 (1986), summarily reversed a judgment entered against the municipal defendant which allegedly had a policy authorizing the use of excessive force when the jury found that the officer apparently did not use excessive force in making an arrest. In short, the Court concluded that the mere existence of the policy was irrelevant because the jury found there to have been no constitutional deprivation:

> But this was an action for damages, and neither *Monell v. New York City Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.

Id. at 799, 106 S.Ct. at 1573, 89 L.Ed.2d at 810-11. *Accord, Palmerin v. City of Riverside,* 794 F.2d 1409, 1414-15 (9th Cir. 1986). Here, as in *Heller and Palmerin,* there was no violation of constitutional rights committed by the individual, Sergeant Dlubak. (A. 625-26). Therefore, the inconsistent judgment against him in his official capacity and against the City of New Kensington cannot stand. The lower courts' decision to the contrary conflicts with this Court's decision in *Heller* and the Ninth Circuit's decision in *Palmerin.*

CONCLUSION

There are a number of special and important reasons for further appellate review. The Third Circuit's unprecedented imposition of section 1983 liability upon a municipality and one of its policemen for failing to respond to a call for assistance extends such liability further than good judgment dictates and other circuits would allow. Moreover, the Third Circuit did not fully and properly analyze the proof required of a direct causal connection between the policeman's omissions and the alleged policy of non-intervention. Thus, the writ of certiorari should be issued and the judgments of the United States Court of Appeals for the Third Circuit and the United States District Court for the Western District of Pennsylvania should be reversed.

MEYER, DARRAGH, BUCKLER, BEBENEK & ECK

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NOT FOR PUBLICATION

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 87-3820

MAMIE HORTON, Individually, and as Administratrix of the Estate of DOUGLAS POWDRILL, Deceased, and MILTON PATRICK

v.

CHARLES a/k/a POPE FLENORY, JR., Individually and t/d/b/a THE CASH CLUB, et al.

City of Kensington and
William Dlubak, in his official capacity,
Appellants

On Appeal from the United States District Court for the Western District of Pennsylvania

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(D.C. Civil No. 84-741)
District Judge: Hon. Alan N. Bloch

Submitted Under Third Circuit Rule 12(6)
June 22, 1988

Before: GIBBONS, *Chief Judge,* HIGGINBOTHAM, *Circuit Judge,* and ROTH, *District Judge*

(Opinion Filed: Aug 18 1988)

MEMORANDUM OPINION OF THE COURT

GIBBONS, *Chief Judge:*

The City of New Kensington and its Police Sergeant Dlubak appeal from a judgment in favor of the Estate of Douglas Powdrill in an action for wrongful death brought pursuant to 42 U.S.C. § 1983. The death occurred as a result of a beating administered in the Cash Club, a private social club. The City and Dlubak contend that the trial court erred in failing to direct a verdict in their favor.

The Cash Club was managed by a former New Kensington police officer, "Pope" Flenory. The decedent Powdrill was suspected by "Pope" of having stolen some records from the club's disc jockey. Dlubak was informed of the suspected theft and summoned to the club by "Pope." When Dlubak arrived at the club, he proceeded to question Powdrill about the theft. Dlubak observed that Powdrill had tears in his eyes, and appeared distressed. Powdrill denied participation in the theft of the records, and pleaded to be taken from the club. Instead, Dlubak left the club, saying to Pope, "I guess you can take care of this yourself. I guess you can handle this."

After Dlubak left, Powdrill was severely beaten. Hours later a relative of Powdrill found him in the club in serious condition. They observed blood on the wall and on the clothing of DeVaugh [*sic*], the disc jockey, who had administered the beating. When the relative sought the assistance of New Kensington Police Officers Kowalkowski and Police Lieutenant Mangione, those officers asked "Pope" about the beating. When he told them it was over, they left. Powdrill's relative, with the help of others, took him to a hospital, where he soon was pronounced dead.

The New Kensington Police Manual provided at the relevant time:

Request for Service from Private Club.

A. When a call is received from a private club, where the complaint is intoxication, the club should be tactfully encouraged to handle its own problem.

B. Such a club is not a public place, and arrests are invalid.

The Cash Club is a private club within the meaning of the manual.

The city and Dlubak concede that a jury could find Dlubak acted under the color of state law, that the Police Manual represents official policy, and that Dlubak acted or failed to act, pursuant to that policy. They urge, nevertheless, that although Dlubak could reasonably foresee serious harm befalling Powdrill, he owed Powdrill no duty. Like the district judge, who thoroughly canvassed the issue, we disagree. *See Martinez v. California,* 444 U.S. 277 (1980); *Estate of Bailey v. County of York,* 768 F.2d 503 (3d Cir. 1985).

The judgment appealed from will therefore be affirmed.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Memorandum Opinion.

/s/ JOHN J. GIBBONS
Chief Judge

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MAMIE HORTON, individually and as Administratrix of the Estate of DOUGLAS POWDRILL, Deceased, and MILTON PATRICK,
Plaintiffs

vs.

CHARLES a/k/a POPE FLENORY, JR., individually and trading and doing business as THE CASH CLUB; WILLIAM DLUBAK, individually and as Police Sergeant, City of New Kensington, Commonwealth of Pennsylvania; JOSEPH MANGIONE, individually and as Police Lieutenant, City of New Kensington, Commonwealth of Pennsylvania; ROBERT KOWALKOWSKI, individually and as a Police Officer, City of New Kensington, Commonwealth of Pennsylvania; EDWARD McAFOOSE, individually and as Police Chief of the City of New Kensington, Commonwealth of Pennsylvania; JOHN J. MONACO, individually and as Mayor of the City of New Kensington, Commonwealth of Pennsylvania; and CITY OF NEW KENSINGTON,
Defendants.

Civil Action No. 84-741

MEMORANDUM OPINION

BLOCH, District J.

This is an action brought pursuant to 42 U.S.C. §§1981, 1983, and 1985; plaintiffs' complaint includes pendent state law claims as well. The plaintiffs in this action are Milton Patrick and Mamie Horton; Ms. Horton sues individually and in her capacity as the administratrix of the estate of Douglas Powdrill. Defendants William Dlubak, Joseph Mangione, Robert Kowalkowski, and Edward McAfoose, members of the police force of the City of New Kensington, have moved this Court for the entry of summary judgment in their favor, relying on several theories which will be treated separately below.

Plaintiffs assert that on November 10, 1981, Milton Patrick and Douglas Powdrill, the deceased son of Mamie Horton, were severely beaten and tortured by defendant Charles Flenory, Jr. (Flenory) and individuals alleged to have been under his control. The alleged beating and torture incident took place in an establishment known as The Cash Club in the City of New Kensington, Pennsylvania. Plaintiffs allege that this club was being operated by Flenory, a former New Kensington police officer, had a history of violent beatings and control by racketeers, and that the New Kensington Police Department had knowledge of these facts.

In late October or early November of 1982, The Cash Club was burglarized. Plaintiffs contend that Flenory organized a gang of club employees for the purpose of discovering who had committed the burglary. On November 10, 1982, defendant Dlubak was dispatched to The Cash Club by police radio to meet Flenory for the purpose of investigating the burglary. Upon entering The Cash

Club, Dlubak allegedly interrogated Douglas Powdrill and another individual and suggested to Flenory that Flenory speak to Milton Patrick, The Cash Club bartender, about the burglary. Plaintiffs allege that Dlubak then instructed Flenory to handle the burglary matter himself.

Plaintiffs allege that Dlubak subsequently left the club, leaving Douglas Powdrill and Milton Patrick in the control of Flenory, with knowledge that Flenory, and the individuals under his control, would inflict serious bodily harm upon Powdrill and Patrick. Plaintiffs contend that although Powdrill had an expression of great fear on his face and was in tears when he asked Dlubak to take him out of the club, Dlubak refused.

Following Dlubak's exit, Powdrill and Patrick allegedly were severely beaten for a period of approximately two hours. At some point during this period of time, two individuals who knew Powdrill entered The Cash Club. Upon observing Powdrill and Patrick had been severely beaten, these individuals drove to the New Kensington Police Department substation nearby, where they informed defendants Kowalkowski and Mangione of the situation.

Kowalkowski and Mangione apparently went to the club immediately. However, plaintiffs allege that although Kowalkowski and Mangione witnessed an individual standing outside the club who was covered with blood, Kowalkowski and Mangione spoke only briefly with Flenory and then left. The beatings allegedly then continued for a period of time. Eventually, Powdrill was carried into the car of a friend, who transported him to the hospital where he later died. Patrick left the club by himself and received assistance in getting to the hospital via an acquitance *(sic)* who lived nearby.

At the hospital, New Kensington Police Officer Veltri interviewed several witnesses who informed Veltri that Powdrill and Patrick had been beaten at The Cash Club. The next day, November 11, 1982, Flenory allegedly requested that Veltri come to his home. When Veltri arrived, Flenory allegedly began volunteering information on the beatings to Veltri. Veltri then instructed Flenory to make no further statements in his presence, and telephoned defendant McAfoose, Police Chief for the City of New Kensington, for further instructions. McAfoose ordered Veltri to leave Flenory's residence and bring Flenory to the police station the following morning. Later that morning, plaintiffs allege, McAfoose and Veltri again spoke and it was decided that Flenory would be taken to his attorney's office instead of to the police department.

It is plaintiffs' position that Flenory had been acting for sometime as the defacto Chief of Police of the black community of New Kensington and was so acting at the time he administered the beatings.

Plaintiffs seek recovery under §§1981, 1983 and 1985 for violation of the constitutional rights of Douglas Powdrill and Milton Patrick. In addition, a wrongful death action is brought pursuant to 42 Pa.C.S.A. § 8301, various state law claims are brought pursuant to 42 Pa.C.S.A. § 8302, and an action for intentional or negligent infliction of emotional distress is brought by plaintiff Horton, based upon injuries she claims to have suffered as a result of witnessing her son's physical state after he had been taken to the hospital.

Defendants first contention is that, to the extent that their liability under §1983 depends upon a finding that Flenory was acting as a defacto Chief of Police for the City of New Kensington, summary judgment should be entered

in their favor. Defendants contend that plaintiffs are unable to establish any set of facts from which a reasonable person could conclude that Flenory was treated in fact as a police chief.

Defendants' contention lacks merit. The liability of the police officers does not depend upon the status of Flenory, whether as a defacto police officer or as an individual. In order to establish a claim under §1983, the plaintiffs must establish three elements: (1) that the conduct complained of was committed by a person acting under color of state law; (2) that this conduct deprived the plaintiffs of rights, privileges or immunities guaranteed by the Constitution of the United States; and (3) that the defendants' actions were the proximate cause of the injuries sustained by the plaintiffs. *Parratt v. Taylor*, 451 U.S. 527 (1981). The status of Flenory at the time the beatings occurred has no bearing upon the plaintiffs' ability to establish any of these three elements. The issue here is not whether the conduct of Flenory is attributable to the defendant officers, as the defendants contend; rather, the focus is on the conduct of the defendant officers and/or the practices and policies of the New Kensington Police Department. Therefore, summary judgment cannot be entered in favor of the defendants on this basis.

The defendants' next contention is that they are immune under the provisions of the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa.C.S.A. §8541, *et seq.* Immunity under this statute would apply only with regard to plaintiffs' state law claims; the supremacy clause of the United States Constitution prevents a state from immunizing individuals alleged to have violated federal law. *Wade v. City of Pittsburgh*, 765 F.2d 407 (3d Cir. 1985). Moreover, while it is true that §8545 grants immunity to any

"employee of a local agency . . . on account of any injury to a person or property caused by acts of the employee which are within the scope of his office or duties . . . " this immunity does not apply where the actions of the employee are judicially determined to constitute "willful misconduct." 42 Pa.C.S.A. §8550. *Morris v. Musser*, 84 Pa. Cmwlth. 170, 478 A.2d 937 (1984). The record as developed so far in this case is sufficient to raise material issues of fact as to whether the conduct of the defendants in this action constituted willful misconduct; therefore, summary judgment cannot be rendered upon this basis.

Defendants' third contention is that the plaintiffs have no constitutional right to adequate police protection and that, therefore, their complaint fails to state a cause of action under §1983. In support of this argument, defendants cite *Morris v. Musser*, *supra*. The *Morris* case holds that police officers have an obligation to protect the citizenry in general; no specific duty is owed to particular persons. Therefore, an individual cannot bring a cause of action under §1983 or the Fourteenth Amendment for violation of such a duty of protection.

The *Morris* case is not on point here. Plaintiffs have not stated a cause of action for inadequate policy protection; rather, plaintiffs state a cause of action for alleged violations of rights secured to them under the Constitution of the United States. Therefore, the Court concludes that defendants' contention lacks merit and summary judgment will not be entered on this basis.

Defendants' next contention is that, as a matter of law, they cannot be found to have been the proximate cause of any harm suffered by the plaintiffs. In support of this position, defendants cite the case of *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982), which held that although a

state may violate the Fourteenth Amendment when its officer, acting under color of state law, deprives a person of life without due process, "there is no constitutional right to be protected by the state against being murdered by criminals or madmen." 686 F.2d at 618. The *Bowers* action was brought by the administrator of the estate of a woman murdered by a psychiatric patient who had been released from a state mental health facility a year earlier. The district court granted summary judgment in favor of the defendant physicians at the state facility and the Circuit affirmed.

The defendants argue that the *Bowers* case, and cases like it, stand for the proposition that mere inaction on the part of a state officer is inadequate to impose liability under §1983. However, the Seventh Circuit was careful to emphasize that inaction by state officers would not necessarily insulate them from liability. The Court stated "if the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snakepit." *Id.* at 618. The Court's holding in favor of the defendants was based upon its conclusion that the harm which was at issue was too remote a consequence of the defendants' conduct to justify the imposition of liability.

The Supreme Court has made clear that inaction alone may in some circumstances form the basis of §1983 liability. In a landmark decision, *Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled in part on other grounds, Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Court held that §1983 is to be read against the background of tort liability, which makes a man responsible for the natural consequences of his actions. Cases subsequent to

Monroe have established liability of police officers where the officers acted with deliberate indifference to the possibility of harm. *See, e.g., Voutour v. Vitale*, 761 F.2d 812 (1st Cir. 1985), *cert. denied, Saugus v. Voutour*, 106 S.Ct. 879 (1986). In addition, in some circumstances, implicit authorization which leads to constitutional violations is sufficient. *McKee v. Heggy*, 703 F.2d 479 (10th Cir. 1983); *Hays v. Jefferson County*, 668 F.2d 869 (6th Cir. 1982), *cert. denied*, 459 U.S. 833 (1982). In short, even assuming that the defendant officers engaged in no affirmative conduct which might be held to cause violations of the plaintiffs' constitutional rights, summary judgment could not be entered in their favor; inaction under circumstances where there is a duty to act may be sufficient to impose liability.

Finally, defendants seek the entry of summary judgment in their favor on Count 3 of the complaint, Mamie Horton's cause of action for intentional or negligent infliction of emotional distress. Summary judgment must be entered in favor of the defendants on this count. The Pennsylvania courts have adopted the standard of § 46 of the Restatement (Second) of Torts concernings actions for intentional infliction of emotional distress. Such an action can be brought where the defendants' conduct is "outrageous" and where the defendants intentionally or recklessly caused severe emotional distress to the plaintiff as a consequence of this outrageous conduct. *Bartanus v. Lis*, 332 Pa. Super. 48, 480 A.2d 1178 (1984). However, where the plaintiff seeks recovery for outrageous conduct directed to a member of his or her immediate family, the plaintiff can recover only if he or she was physically present at the time the outrageous conduct occurred. *Peirce v. Penman*, ___ Pa. Super. ___, 515 A.2d 948 (1986); *Stoddard v. Davidson*, ___ Pa. Super. ___, 513 A.2d 419 (1986).

Similarly, although the Pennsylvania courts do recognize a cause of action for negligent infliction of emotional distress, *Stoddard, supra*, recovery can be had only if the plaintiff is a close family member and actually witnessed the outrageous conduct and suffered a direct emotional impact as a consequence of observing the conduct. *Stoddard, supra.*

There is no dispute that plaintiff, Mamie Horton, was not present at The Cash Club on November 10, 1982, where the alleged beatings and torture occurred. She observed her son at the New Kensington Hospital shortly before he died. Her cause of action is based upon the emotional distress which she suffered as a consequence of viewing him at that time. This is insufficient to state a cause of action under the Pennsylvania law for infliction of emotional distress. Therefore, summary judgment must be granted on Count 3 of plaintiffs' complaint.

Finally, the Court notes that defendants have devoted a considerable portion of their argument in support of their motion to the issue of whether plaintiffs can state a cause of action under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, *et seq.* The Court does not view plaintiffs' complaint, as amended, as attempting to state a cause of action under RICO and, therefore, this issued need not be further addressed herein.

An appropriate Order will be issued.

/s/ ALAN N. BLOCH
United States District Judge

Date 3/24/87
cc: Counsel of record.

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MAMIE HORTON, individually and as Administratrix of the Estate of DOUGLAS POWDRILL, Deceased, and MILTON PATRICK,

Plaintiffs

vs.

CHARLES a/k/a POPE FLENORY, JR., individually and trading and doing business as THE CASH CLUB; WILLIAM DLUBAK, individually and as Police Sergeant, City of New Kensington, Commonwealth of Pennsylvania; JOSEPH MANGIONE, individually and as Police Lieutenant, City of New Kensington, Commonwealth of Pennsylvania; ROBERT KOWALKOWSKI, individually and as a Police Officer, City of New Kensington, Commonwealth of Pennsylvania; EDWARD McAFOOSE, individually and as Police Chief of the City of New Kensington, Commonwealth of Pennsylvania; JOHN J. MONACO, individually and as Mayor of the City of New Kensington, Commonwealth of Pennsylvania; and CITY OF NEW KENSINGTON,

Defendants.

Civil Action No. 84-741

MEMORANDUM OPINION

BLOCH, District J.

Plaintiffs, Milton Patrick and Mamie Horton, bring this action pursuant to 42 U.S.C. §§ 1981, 1983, and 1985; plaintiffs also seek recovery under various state law theories. Milton Patrick seeks recovery for injuries he personally suffered, allegedly as a consequence of conduct of the defendants. Mamie Horton brings an action for intentional and/or negligent infliction of emotional distress, and also brings an action in her capacity as the administratrix of the estate of her son, Douglas Powdrill, who allegedly died as a result of the conduct of the defendants.

Defendant Charles Flenory, Jr. (Flenory) is a former member of the New Kensington police force. Defendants William Dlubak, Joseph Mangione, Robert Kowalkowski, and Edward McAfoose, at all relevant times were members of the New Kensington police force. Defendant John Monaco was, at all times relevant hereto, the Mayor of the City of New Kensington. The City of New Kensington also has been named as a defendant in this action, and has filed a motion for summary judgment which is the subject of this opinion.

Plaintiffs assert that on November 10, 1982, Milton Patrick and Douglas Powdrill were severely beaten and tortured by defendant Flenory and individuals alleged to have been under his control at the time. The alleged beating and torture incident took place in an establishment known as The Cash Club in the City of New Kensington, Pennsylvania. Plaintiffs allege that this club was being operated by Flenory and had a history of violence and

racketeering influence, and that the City of New Kensington, acting through its police department, is charged with knowledge of these facts.

In late October or early November of 1982, The Cash Club was burglarized. Plaintiffs allege that Flenory organized a gang of club employees for the purpose of discovering who had committed the burglary. On November 10, 1982, defendant Dlubak was dispatched to The Cash Club by police radio to meet Flenory for the purpose of investigating the burglary. Upon entering The Cash Club, Dlubak allegedly questioned Douglas Powdrill and another individual about the burglary. Dlubak also is claimed to have suggested to Flenory that Flenory speak to Milton Patrick about the burglary, since Milton Patrick was, at the time, employed as a bartender at The Cash Club.

Plaintiffs claim that before Dlubak arrived at The Cash Club, Powdrill had already been beaten. They claim that, before Dlubak left the club, leaving Powdrill and Patrick in the control of Flenory and his associates, Dlubak had knowledge that serious bodily harm would result to Powdrill and Patrick. Nevertheless, Dlubak allegedly instructed Flenory to handle the burglary matter himself. Plaintiffs contend that although Powdrill had an expression of great fear on his face and was in tears, when he requested Dlubak to take him out of the club, Dlubak refused.

Following Dlubak's exit, Powdrill and Patrick were severely beaten for a period of approximately two hours. At some point during this period of time, two individuals familiar to Powdrill entered The Cash Club. Upon observing that Powdrill and Patrick had been severely beaten, these individuals went to the New Kensington Police

Department substation nearby, where they informed defendants Kowalkowski and Mangione of the situation.

Kowalkowski and Mangione apparently went to the club immediately. Plaintiffs contend that Kowalkowski and Mangione witnessed an individual standing outside the club, with blood on his clothing. They spoke with Flenory briefly; Flenory allegedly told them that the beatings had ceased and the officers left. Plaintiffs contend that the officers spent no more than three minutes investigating the incident.

The beatings allegedly then continued for a period of time. Eventually, Powdrill was carried to the car of a friend and transported to a hospital, where he later died. Patrick left the club by himself and received assistance in getting to the hospital via an acquaintance who lived nearby.

At the hospital, New Kensington Police Officer Veltri interviewed several witnesses who informed him that Powdrill and Patrick had been beaten at The Cash Club. The following day, Flenory allegedly requested that Veltri come to his home. When Veltri arrived, Flenory volunteered information on the beatings to Veltri, who then instructed Flenory to make no further statements in his presence. Veltri telephoned defendant McAfoose, the Police Chief for the City of New Kensington, for further instructions. McAfoose allegedly ordered Veltri to leave Flenory's residence and to bring Flenory to the police station. Later, plaintiffs allege, McAfoose and Veltri again spoke and it was decided that Flenory would be taken to his attorney's office, instead of to the Police Department.

Plaintiffs seek to hold the City of New Kensington liable for the harm suffered by plaintiffs as a consequence of the actions which took place at The Cash Club on

November 10, 1982. Plaintiffs allege that the City of New Kensington had knowledge, through its Police Department, that Flenory had a long history of violent behavior, and that The Cash Club had been the scene of several violent incidents. Plaintiffs contend that, despite this knowledge, the City of New Kensington engaged in a policy or practice of disregarding violent incidents occuring at The Cash Club. In addition, plaintiffs claim that the City of New Kensington granted Flenory favorable treatment in connection with these violent incidents.

Plaintiffs also contend that the City of New Kensington had a general policy that applied to all private clubs, such as The Cash Club. The City of New Kensington Police Manual provides that arrests made in a private club are "invalid." In connection with this stated policy, plaintiffs allege that City of New Kensington police officers simply failed to investigate, or inadequately investigated, problems at private clubs such as The Cash Club. Plaintiffs contend that these policies amount to an intentional disregard of individual's constitutional rights, and/or that the policies demonstrate negligent or grossly negligent conduct on the part of the City of New Kensington. Plaintiffs seek to attach liability to the City on this basis.

The City of New Kensington's motion for summary judgment raises several issues, which will be addressed individually below. Pursuant to Fed. R. Civ. P. 56(c), summary judgment may be entered only where there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In ruling upon a summary judgment motion, all inferences of fact must be drawn against the movant in favor of the party opposing the motion. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). The moving party bears the burden of proving that

there are no material facts in dispute. *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870 (3d Cir. 1972). The Court, in ruling on a summary judgment motion, should not resolve factual issues; rather, the Court should simply determine whether there are any factual issues in dispute. *United States v. Diebold, Inc.*, 369 U.S. 654 (1962).

The City of New Kensington contends that it is entitled to summary judgment on all state law tort claims asserted by plaintiffs against it, because it is immune from suit on such claims pursuant to the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa.C.S.A. §8541, *et seq.* The Court concurs with the defendant's position on this issue; summary judgment will be entered in favor of the City on the state law claims.

The controlling provision of the Act, 42 Pa.C.S.A. §8541, provides as follows:

> *Governmental immunity generally:*
>
> Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.

The only exceptions to the grant of general immunity in §8541 are contained in the following section of the Act, 42 Pa.C.S.A. §8542. Section 8542 provides that certain acts by a local agency or its employees may result in the imposition of liability. These include harm resulting from the operation of a motor vehicle, harm to personal or real property in the care, custody, or control of the local agency, and dangerous conditions resulting from such things as trees, traffic controls, street lighting, sidewalks, etc. None of the exceptions are applicable herein. Political subdivisions are immune from suit under the Political

Subdivision Tort Claims Act unless the conduct of the municipality falls within one of the eight exceptions enumerated in §8542. *Carroll v. County of York*, 496 Pa. 363, 437 A.2d 394 (1981).

The statutory grant of immunity contained in §8541 is consistent with the prior Pennsylvania law on this subject. The state, being a sovereign entity, cannot be sued without its consent. *Stouffer v. Morrison*, 400 Pa. 497, 162 A.2d 378 (1960). This sovereign immunity can be waived only by statute, and where it is so waived, it is to be narrowly construed. *Graysneck v. Heard*, 422 Pa. 111, 220 A.2d 893 (1966).

It is clear in light of the foregoing that plaintiffs cannot assert liability against the City on the state tort claims set forth in their complaint. However, it is equally clear that sovereign immunity, as explicitly established by the Pennsylvania legislature in §8541, is ineffective when applied to suits brought under the Civil Rights Act. The supremacy clause of the United States Constitution prevents a state from immunizing entities or individuals who are alleged to have violated federal law. *Wade v. City of Pittsburgh*, 765 F.2d 405 (3d Cir. 1985).

The City of New Kensington next contends that it is immune from liability for punitive damages on both the federal and state law claims. Since the Court has held that plaintiffs have no cause of action against the City on their state law claims, only the issue of punitive damages pursuant to the federal claims must be addressed.

In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), the Supreme Court held that municipalities are immune from punitive damages under §1983. The Court

reasoned that, although municipal governments are considered to be "persons" within the meaning of §1983, *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), no purpose is served by assessing punitive damages against a city for conduct violating constitutional rights. "Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct . . . . A municipality, however, can have no malice independent of the malice of its officials. Damages awarded for *punitive* purposes, therefore, are not sensibly assessed against the governmental entity itself." The Court reasoned that, in such cases, the punitive damages would be paid by "blameless or unknowing taxpayers." 453 U.S. 266-67.

Despite this apparently unequivocal holding by the Court, plaintiffs contend that the Court did not intend to preclude recovery of punitive damages against a city in all circumstances. Plaintiffs are correct in contending that the Court left open the possibility that, in an extreme situation, where taxpayers themselves are directly responsible for perpetrating an outrageous abuse of constitutional rights, punitive damages might be assessed against them. However, such is not the case here. There is no indication whatsoever, either in the complaint itself or in the materials supplied in connection with the summary judgment motion, which would indicate any tortious action by taxpayers of the City of New Kensington. Therefore, the *Newport* holding controls, and plaintiffs will not be entitled to recover punitive damages against the City under 42 U.S.C. §1983.

Plaintiffs have also brought an action pursuant to 42 U.S.C. §1981. Following the holding in *Newport, supra,* that punitive damages may not be awarded against municipalities under §1983, several Circuits have held that such damages likewise are not available in actions pursuant to §1981. *Bell v. Milwaukee,* 746 F.2d 1205 (7th Cir. 1984); *Poolaw v. Anadarko,* 738 F.2d 364 (10th Cir. 1984), *cert. denied,* 469 U.S. 1108 (1985); *Heritage Homes v. Seekonk Water District,* 670 F.2d (1st Cir. 1982), *cert. denied,* 457 U.S. 1120 (1982). The Third Circuit has not had the opportunity to reach this issue. However, the rationale stated in *Newport* appears to apply with equally persuasive force to actions brought pursuant to §1981. An award of punitive damages against a municipality would not likely have any significant punitive or deterrent effect. Therefore, plaintiffs will not be allowed to seek punitive damages against the City pursuant to their §1981 claim.

Plaintiffs have also brought a cause of action pursuant to 42 U.S.C. §1985. The issue of whether punitive damages may be assessed against a municipality pursuant to §1985 has not been squarely addressed by any circuit court since the *Newport* decision. However, the Fifth Circuit has stated, in dicta, that punitive damages would not be awarded against a municipality in such a context. *Thomas v. City of New Orleans,* 687 F.2d 80, 84, n.2 (5th Cir. 1982).

The rationale stated by the *Newport* Court for precluding punitive damage awards against a municipality under §1983 applies with equal force to § 1985 actions. Since an award of punitive damages against a municipality serves to "punish" only the taxpayers, who have taken no part in the unlawful actions, punitive damage awards would not serve the purpose of penalizing the individuals involved and,

therefore, would not have the deterrent effect which punitive damages are designed to serve. *See, e.g.*, Restatement (Second) of Torts §908 (1979); *Newport, supra,* at 266-67. Plaintiffs will not be allowed to seek punitive damages against the City pursuant to 42 U.S.C. §1985.

The City next argues that it is entitled to summary judgment on a claim which it contends plaintiffs have brought pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, *et seq.* The Court does not view plaintiff's complaint, as amended, as attempting to assert a cause of action under RICO and, therefore, this issue need not be further addressed herein.

The City next argues that plaintiff Horton's asserted claims against all defendants for negligent and/or intentional infliction of emotional distress must be dismissed. Plaintiff's theory is that she was caused emotional distress as a consequence of viewing her son following the beating and as a consequence of his subsequent death. Although the Court has ruled, *supra,* that the City is immune from suit under state tort law theories pursuant to 42 Pa. C.S.A. §8541, the City is entitled to summary judgment on plaintiff Horton's claims for infliction of emotional distress on an independent basis.

The Pennsylvania law concerning actions for infliction of emotional distress follows the standard set forth in §46 of the Restatement (Second) of Torts. An action for intentional infliction of emotional distress may be brought where the defendant's conduct is "outrageous" and where the defendant intentionally or recklessly caused severe emotional distress to the plaintiff through this outrageous conduct. *Bartanus v. Lis,* 332 Pa. Super. 48, 480 A.2d 1178 (1984). However, where the plaintiff seeks recovery for

intentional infliction of emotional distress as a consequence of injury to a member of his or her immediate family, the plaintiff can recover only if he or she was physically present at the time the outrageous conduct occurred. *Peirce v. Penman*, ___ Pa. Super. ___, 515 A.2d 948 (1986); *Stoddard v. Davidson*, ___ Pa. Super. ___, 513 A.2d 419 (1986). There is no dispute that plaintiff Horton was not present at The Cash Club on November 10, 1982, when the alleged beatings and torture took place. Therefore, under the Pennsylvania case law, she has no cause of action for intentional infliction of emotional distress, and judgment must be entered in favor of the defendant City on Count 3 of the complaint to the extent it states such a cause of action.

The Pennsylvania courts recognize a cause of action of negligent infliction of emotional distress as well. *Stoddard, supra.* However, like the action for intentional infliction of emotional distress, recovery may be had where a close family member was the victim of the outrageous conduct, only if the plaintiff actually witnessed that conduct. *Stoddard, supra.* Since there is no dispute that plaintiff Horton did not actually witness the allegedly outrageous conduct at issue herein, she has no cause of action for negligent infliction of emotional distress and the defendant City is entitled to judgment as a matter of law on Count 3.

The City next argues that it is entitled to summary judgment on plaintiffs' claim for recovery under 42 U.S.C. §1983 because plaintiffs have entirely failed to establish that any "policy" or "custom" of the City caused or permitted any of the claimed violations of plaintiffs' constitutional rights.

Title 42 U.S.C. §1983 reads in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In *Monroe v. Pape,* 365 U.S. 167 (1961), the Supreme Court held that a municipality was not a "person" within the meaning of §1983 and, therefore, was immune from suit thereunder. However, this holding was reversed in *Monell v. New York City Department of Social Services,* 436 U.S. 658 (1978). In *Monell,* the Court examined the legislative history of the Civil Rights Act of 1871, and reached the conclusion that Congress did intend that municipalities and other local government units be included among those "persons" to whom § 1983 applies. However, the Court also held that municipal liability cannot be predicated on a *respondeat superior* theory. A city may be held liable under §1983 where the action that is alleged to be unconstitutional "implements or executes" a policy or practice adopted by the city. 436 U.S. at 690. A local government may be held liable under §1983 for such a policy even if that policy has not received formal approval through the governing body's official decision-making channels. "Customs" or "usages" may represent persistent or widespread discriminatory practices which, although not authorized by written law, have a permanent and well settled nature so as to operate with the force of law and, therefore, form the basis of §1983 liability. 436 U.S. at 691.

In ruling upon a motion for summary judgment, the Court is not called upon to decide factual issues; rather, the purpose is simply to determine whether there are material facts in dispute. Fed. R. Civ. P. 56(c); *United States v. Diebold, Inc., supra.* Applying this standard to the case at hand, the Court concludes that there are material issues of fact concerning the existence of a policy or custom of the City of New Kensington which could have permitted or caused the claimed violations of plaintiffs' constitutional rights.

Plaintiffs contend that the record established to date in this case supports the conclusion that the City of New Kensington, acting through its Mayor and Police Department, granted preferential treatment to defendant Flenory and his associates. In support of this contention, plaintiffs point to numerous instances of violence on the part of defendant Flenory, as well as by persons known to be associated with him, and a history of lenient treatment despite these violent activities. Plaintiffs contend that the City of New Kensington, acting through its officials, was more aware of Flenory's conduct than it otherwise might be because much of it occurred during the period of time that Flenory was employed as a New Kensington police officer. Despite knowledge of the violent propensities which plaintiffs' claim Flenory has shown, it is plaintiffs' position that the City of New Kensington ignored or disregarded the threat posed by Flenory to individuals. Specifically, plaintiffs contend that the City was well aware that The Cash Club, which was run by defendant Flenory, had a history of extremely violent behavior which was well known to the City. Nevertheless, City of New Kensington police officers refrained from intervening in violent incidents which took place at the club. Plaintiffs contend that

as a result of this policy of disregarding the violent conduct of defendant Flenory and the violent history of The Cash Club, Douglas Powdrill and Milton Patrick were beaten and tortured at The Cash Club in violation of their constitutional rights.

In addition to a policy of disregarding the violent history of defendant Flenory and The Cash Club, plaintiffs contend that the City of New Kensington had a general policy of disregarding violence and unlawful behavior in private clubs within the City limits. Plaintiffs make reference to a portion of the City of New Kensington Police Department Manual which informs the City's officers that arrests made at private clubs are invalid, and that incidents involving intoxication at such clubs shold be left to resolution by the club itself. Although the Police Department Manual makes explict reference to problems involving intoxication, plaintiffs contend that this policy carried over to all incidents, including those involving violence, occurring at private clubs within the City limits. Plaintiffs make reference to portions of depositions of City of New Kensington police officers in support of this contention. These depositions suffice to raise issues of material fact concerning the existence of a policy or practice of the City of New Kensington of disregarding unlawful behavior within its private clubs.

Under *Monell,* even if it is demonstrated that a city has a policy or custom which would tend to lead to violations of constitutional rights, recovery cannot be had unless it is established that the policy in question somehow caused the deprivation of constitutional rights of the particular plaintiffs in the suit. It is apparently undisputed that The Cash Club falls within the category of "private

clubs" within the meaning of the Police Department Manual. Plaintiffs' version of the incidents occurring on November 10, 1982, at The Cash Club (as supported by affidavit, deposition, and discovery materials), suggests that defendant police officers Dlubak, Kowalkowski and Mangione had reason to know that violent activities were taking place within The Cash Club on that date, but failed to intervene or otherwise act to protect Douglas Powdrill and Milton Patrick. Plaintiffs contend that this alleged failure to act was in conformity with the City of New Kensington's general "hands off" policy concerning private clubs as well as the City's general practice of disregarding violence perpetrated by Charles Flenory or associated with The Cash Club. Plaintiffs herein have raised sufficient factual issues relating to causation to preclude entry of summary judgment against them on this basis.

The City also argues that negligent conduct of City officials cannot suffice as the basis for imposing liability against the City under §1983, and that, at most, the alleged conduct of the police officers in this case amounts to mere negligence.

In *Daniels v. Williams*, ___ U.S. ___, 106 S.Ct. 662 (1986), the Supreme Court held that "in any given §1983 suit, the plaintiff must . . . prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim." *Id.* at 664. The plaintiff in *Daniels* had raised a claim under the due process clause of the Fourteenth Amendment; the Court concluded that, at least with regard to due process concerns, merely negligent conduct of an official does not rise to the level of a constitutional violation.

The Supreme Court in *Daniels* left open the possibility that liability for a violation of due process or other constitutional rights could be predicated upon conduct evidencing a higher degree of culpability than negligence, e.g., gross negligence, deliberate indifference, or intentional violations. It is unnecessary for the Court to address at this time the issue of whether simple negligence would give rise to a cause of action under any of the constitutional provisions allegedly violated in the case at hand. Determinations of the degree of culpability of an individual are particularly unsuited to resolution on summary judgment since they necessarily require an assessment of the mental state of the actor at the time the allegedly tortious conduct occurred. The Court cannot conclude, on the present state of the record developed in this case, that the conduct of the police officers on the dates in question constituted no more than simple negligence. Sufficient factual issues have been raised to give rise to the possibility that the conduct could be found to be grossly negligent, deliberately indifferent, or worse.

In short, the Court concludes that defendant City of New Kensington has failed to meet its burden of establishing that there are no material facts in dispute in relation to plaintiffs' §1983 cause of action. *Smith v. Pittsburgh Gage & Supply Co., supra.* Therefore, summary judgment will not be entered in favor of the defendant City on this basis.

The defendant City raises two arguments in connection with plaintiffs' claim under 42 U.S.C. §1985. First, the City argues that plaintiffs have failed to plead a cause of action under §1985 with sufficient specificity. Secondly, the City contends that a municipality may be held liable under §1985 only if it is shown that a custom or policy on the part of the City exists which has caused a violation of the

plaintiffs' constitutional rights. The City contends that plaintiffs are unable to show any such policy or custom and that, therefore, the City is entitled to summary judgment on the §1985 claims.

Greater specificity is required in complaints stating causes of action under the Civil Rights Act then would otherwise be the case. This specificity requirement is intended to weed out, at an early stage, frivolous claims and those that should be heard in state court. *Rotolo v. Borough of Charleroi,* 532 F. 2d 920 (3d Cir. 1976). The specificity requirement is also designed to provide the defendant with sufficient notice of the claims asserted. *United States v. City of Philadelphia,* 644 F.2d 187 (3d Cir. 1980).

In *Frazier v. Southeastern Pennsylvania Transportation Authority,* 785 F.2d 65 (3d Cir. 1986), the Circuit reviewed the specificity requirement in civil rights actions and concluded that complaints should be dismissed only where they are "broad and conclusory" and fail "to state facts in support of their conclusions." So long as the pleadings enable the defendant to discern the nature of the claim stated, and is sufficiently clear and precise to ensure that the claim belongs in the federal court and is not frivolous, the complaint is not inadequate and should not be dismissed. Applying this standard to the instant case, the Court concludes that plaintiffs have sufficiently and specifically alleged a cause of action under §1985.

In order to set forth the basics of a cause of action under §1985, the plaintiffs must allege (1) that the defendants have conspired to deprive the plaintiffs of equal protection of the law or of the privileges and immunities granted to all citizens under the law; (2) that there was a

racially-based discriminatory intent to deprive the plaintiffs of the aforesaid rights, privileges, or immunities; (3) that there was at least one overt act committed in furtherance of the conspiracy; and (4) that injury to the plaintiffs resulted. *Griffin v. Breckenridge*, 402 U.S. 88 (1971). Count 1 of plaintiffs' complaint, at paragraph 36, alleges that the defendant police officers Dlubak, Mangione, and Kowalkowski, as well as defendant Flenory, acting in concert, motivated by racial prejudice, deprived Douglas Powdrill and Milton Patrick of rights, privileges and immunities secured to them by the Thirteenth and Fourteenth Amendments to the United States Constitution, in violation of 42 U.S.C. § 1985.

Paragraph 37 of the complaint states that the City of New Kensington, while acting in concert with defendants Monaco, McAfoose, Mangione, Flenory and/or Dlubak, who were motivated by racial prejudice, is liable for the aforesaid constitutional violations on the basis that the City of New Kensington had knowledge of sufficient facts to indicate, *inter alia*, that defendant Flenory posed a great danger to individuals within the community. Plaintiffs further allege, in paragraph 37, that despite this knowledge, the City failed to investigate and take corrective action in connection with, *inter alia*, Flenory's conduct.

Paragraph 30 of the complaint alleges that the City of New Kensington engaged in a "systematic pattern" of illegal and unconstitutional conduct which resulted in physical violence and brutal assaults upon black individuals in the City of New Kensington. Paragraph 32 of the complaint alleges that the City of New Kensington failed to take any disciplinary measures against the defendant police officers, and failed to relieve them of their duties following the incidents which occurred on November 10,

1982. Taken as a whole, plaintiffs' complaint sufficiently alleges facts to apprise the defendant City of New Kensington of the nature of the claim being asserted against it pursuant to §1985. The claim cannot be said to be frivolous on its face. *Frazier, supra.* Therefore, the Court concludes that the complaint does not fail for lack for specificity.

As noted above, the defendant City also contends that plaintiffs are unable to establish the existence of any policy, practice or custom on the part of the City which could be found to have caused the violation of any constitutional rights. The City argues that, as with §1983, liability of a local government entity must be predicated upon an official policy or custom.

Monell's holding that a local government entity may be held liable only where the claimed constitutional violation was the result of conduct executing or implementing a policy or custom of the municipality applied directly only to §1983 claims. Since *Monell*, only one circuit court has had the opportunity to address the issue of whether the same rationale would apply to §1985 claims. In *Owens v. Haas*, 601 F.2d 1242, 1247 (2nd Cir. 1979), *cert. denied*, 444 U.S. 980 (1979), the Second Circuit reasoned as follows:

> Since under *Monell*, a local body is a "person" for the purposes of §1983, we assume that the same definition of "person" would apply to §1985, which allows damages whenever two or more "persons" conspire to violate the civil rights of another.

The Circuit then went on to hold that a §1985 claim will lie where there exists an official custom or policy of the

local government entity which relates to matters "stemming from or resulting in a conspiracy implicating" the government entity itself. 601 F.2d at 1247.

In *DiMaggio v. O'Brien*, 497 F. Supp. 870 (E.D. Pa. 1980), the Court employed a similar rationale in holding that municipalities may be held liable under §1985 where the conspiracy involves a policy or custom of the local government entity. The Court noted that §§1985 and 1983 both are part of the Civil Rights Act of 1871 and, therefore, it would be reasonable to presume that the definition of "person" in both sections was meant to carry the same connotation, thereby permitting municipal liability as in *Monell*. The Court also noted that the causation language in §1985 is equivalent to that in § 1983, and that it was this language upon which the Supreme Court relied in reaching the conclusion in *Monell* that municipalities may be held liable under §1983 where constitutional violations have resulted from the execution of a policy.

The Court finds the reasoning of *Owens* and *DiMaggio* persuasive. In order to state a cause of action against the City pursuant to §1985, the plaintiffs must establish an official custom or policy of the City which either derived from or resulted in a conspiracy to deprive plaintiffs of their constitutional rights. The question now becomes whether there are material facts genuinely in dispute which relate to this issue.

As described above in connection with their §1983 claim, the plaintiffs have been able to demonstrate a sufficient factual basis for the existence of a municipal policy as to preclude the entry of summary judgment. That is, plaintiffs have made reference via affidavits, depositions, and discovery materials to matters which give rise to material issues of fact concerning the existence of such a policy.

A civil conspiracy is a combination of two or more persons, acting in concert, to commit an unlawful act, or to commit a lawful act by unlawful means. The principal element of such a conspiracy is an agreement between the parties to inflict a wrong against or injury upon another. *Lenard v. Argento,* 699 F.2d 874 (7th Cir. 1983), *cert. denied,* 464 U.S. 817 (1983). The agreement may be tacit. *Santiago v. City of Philadelphia,* 435 F. Supp. 136 (D.C. Pa. 1977). The plaintiffs need not provide direct evidence of agreement between co-conspirators; circumstantial evidence often may provide adequate proof of conspiracy. *Hampton v. Hanrahan,* 600 F.2d 600 (7th Cir. 1979), *rev'd. in part on other grounds,* 446 U.S. 754 (1980); *Crowe v. Lucas,* 595 F.2d 985 (5th Cir. 1979).

In the absence of an admission by a conspirator, it is unlikely that a plaintiff ever will be able to provide direct evidence of a conspiratorial agreement. To demonstrate the existence of a conspiratorial agreement, the plaintiffs must simply show that there was a single plan, the essential nature and general scope of which was known to each person who is to be held responsible for its consequences. *Hampton, supra; Hoffman-LaRoche, Inc. v. Greenberg,* 447 F.2d 872 (7th Cir. 1971). In *Crowe, supra,* the Court held that a showing that the defendants had participated in private meetings at which the plaintiff was discussed, coupled with evidence concerning the defendants' subsequent course of conduct toward the plaintiff, was sufficient to reasonably support a finding that a conspiracy existed. Therefore, the Circuit reversed the district court's entry of a judgment notwithstanding the verdict in favor of the defendants. Applying these principles to the instant case, and construing all inferences of fact in favor of the plaintiffs, *Adickes v. S. H. Kress & Co.,* 398 U.S. 144 (1970), the

Court concludes that there exist material issues of fact as to whether a conspiracy within the meaning of §1985 existed.

Plaintiffs make reference to discovery materials and portions of depositions which suggest that members of the New Kensington Police Department carried out a systematic policy of disregarding complaints of unlawful conduct at private clubs, and at The Cash Club in particular. Plaintiffs also make reference to materials which suggest that the City of New Kensington itself encouraged such a "hands off" policy. Although the issue is by no means free of doubt, the Court cannot conclude that these allegations, if believed would be insufficient as a matter of law, to demonstrate the existence of a conspiracy. Therefore, summary judgment will not be entered in favor of the defendant City on the §1985 claim.

The City next contends that it is entitled to summary judgment on plaintiffs' claim pursuant to 42 U.S.C. §1981. Section 1981 provides that "all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

The Third Circuit has held that this language goes beyond contractual matters. Racially motivated misuse of governmental power falls within the ambit of §1981's "equal benefit" and "like punishment" clauses. *Hall v. Pennsylvania State Police*, 570 F.2d 86 (3d Cir. 1978). The Third Circuit also has held that municipalities are proper

defendants in a §1981 action. *Mahone v. Waddle,* 564 F.2d 1018 (3d Cir. 1977), *cert. denied,* 438 U.S. 904 (1978).

Liability under §1981 cannot be established without proof of intentional discrimination. *General Building Contractors Association, Inc. v. Pennsylvania,* 458 U.S. 375 (1982). The defendant City contends that plaintiffs are unable to establish facts which would support a finding of intentional discrimination on the part of the City. Since the City can act only through its employees and officials, liability must turn upon the conduct of those individuals under the particular circumstances of the case. In *General Building Contractors Association, supra,* the Court examined the facts of record to determine whether they would support imposition of liability on a *respondeat superior* theory; the Court found that imposition of liability on this basis could not be established without at least a showing of an agency relationship.

Agency is a fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. Restatement (Second) of Agency §1; *General Building Contractors Association, supra,* at 392.

The materials submitted in connection with the City's motion suggest that an agency relationship existed between the City of New Kensington and members of its police force and, in particular, defendant Mangione. Plaintiffs have made reference to statements of defendant Mangione which give rise to material issues concerning intentional racially based discrimination on his part. Therefore, the Court concludes that summary judgment cannot be entered on plaintiffs' §1981 claim.

The defendant City asserts that plaintiffs have failed to state a claim pursuant to 42 U.S.C. §1988. *Moor v. County of Alameda*, 411 U.S. 693 (1973), holds that §1988 is merely a compliment to the other civil rights acts; it suffices to confer jurisdiction on the district courts and to grant successful plaintiffs a right to recover attorney's fees. It does not create an independent cause of action. *See also Monell*, 436 U.S. at 701, n. 66. Since this case has not proceeded to the point where a ruling on attorney's fees claims would be appropriate, the Court rejects the City's argument that plaintiffs' §1988 claim should be dismissed.

Finally, the City argues that plaintiffs cannot bring a cause of action against the City directly under the United States Constitution but, rather, must proceed pursuant to 42 U.S.C. §1983. A review of the plaintiffs' complaint does not indicate that they have stated constitutional claims in a context other than §1983; therefore, the City's argument on this basis must be rejected.

An appropriate Order will be issued.

/s/ ALAN N. BLOCH
United States District Judge

Date 3/24/87
cc: Counsel of record.

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 87-3820

MAMIE HORTON, Individually and as Administratrix of the Estate of DOUGLAS POWDRILL, Deceased, and MILTON PATRICK

v.

CHARLES a/k/a POPE FLENORY, JR., Individually and t/d/b/a THE CASH CLUB, et al.

City of New Kensington and William Dlubak, in his official capacity, Appellants

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 84-741)
District Judge: Hon. Alan N. Bloch

Submitted Under Third Circuit Rule 12(6)
Before: GIBBONS, *Chief Judge*, HIGGINBOTHAM, *Circuit Judge* and ROTH, *District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted under Third Circuit Rule 12(6) on June 22, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court entered November 4, 1987 be and the same is hereby affirmed.

Costs are taxed against appellant.

Attest:

/s/ SALLY MRVOS
Clerk

AUG 18 1988

Costs taxed in favor of appellee as follows:

BRIEF	$ 61.58
SUPP. APPENDIX	$ 64.30
TOTAL	$125.88

Certified as a true copy and issued in lieu of a formal mandate on September 9, 1988.

Test: /S/ M. ELIZABETH FERGUSON
Chief Deputy Clerk, United States Court of Appeals, for the Third Circuit

COPY

JUDGMENT IN A CIVIL CASE

United States District Court

CASE TITLE

MAMIE HORTON, Administratrix of the
Estate of Douglas Powdrill, Deceased

v.

William Dlubak, as Police Sergeant,
City of New Kensington, Com. of Pa.
and City of New Kensington

DISTRICT

Western District of Pennsylvania

DOCKET NUMBER

Civil Action No. 84-741

NAME OF JUDGE OR MAGISTRATE

Judge Alan N. Bloch

☒ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment is entered in favor of the plaintiff, Mamie Horton, Administratrix of the Estate of Douglas Powdrill, and against the defendants William Dlubak, as Police Sergeant, City of New Kensington, Commonwealth of Pennsylvania and City of New Kensington in the amount of $65,899.00 plus costs.

CLERK

/s/ CATHERINE D. MARTRANO

(BY) DEPUTY CLERK

/s/ COLLEEN WILLISON

DATE

NOV 4 1987

(2)

Supreme Court, U.S.
FILED
DEC 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-816

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

WILLIAM DLUBAK, as POLICE SERGEANT OF THE CITY OF NEW KENSINGTON, and CITY OF NEW KENSINGTON,

Petitioners,

vs.

MAMIE HORTON, as Administratrix of the Estate of Douglas Powdrill, Deceased,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. THIS CASE INVOLVES CONDUCT MORE CULPABLE THAN NEGLIGENCE

In Daniels v. Williams, 474 U.S., 327 (1986) and Davidson v. Cannon, 474 U.S. 344 (1986), this Court held that the due process clause of the 14th Amendment is not violated through negligent conduct. Even though this case involves conduct more culpable than negligence, the Petition for Certiorari of the City of New Kensington and William Dlubak has framed the Questions Presented for Review in terms of a "negligent deprivation" and "negligent omissions". The facts of the case adduced at trial, in the light most favorable to Respondent Mamie Horton, (See, e.g., Berndt v. Kaiser Aluminum &

Chemical Sales Inc., 789 F.2d 253 (3rd Cir. 1986)) are set forth below.

Early in the afternoon on November 10, 1982, New Kensington Police Detective Sergeant Dlubak (Det. Dlubak hereinafter), while on duty, received a radio call from the police dispatcher informing Det. Dlubak that Charles "Pope" Flenory, Jr. (Pope hereinafter), wanted to speak to Det. Dlubak, at a private club known as the Cash Club. (A. 974, L. 18-21). Pope was the manager of the Cash Club. (A. 974. L. 18-21). Det. Dlubak had known Pope all the Pope's life. (A. 134, L. 10-11). Pope was also a retired New Kensington police officer who had

worked with Det. Dlubak. Pope had retired in October of 1981 after being a New Kensington Police Officer for approximately 18 years. (A. 791-794).

Pope, when he telephoned for Det. Dlubak to come to the Club, was in the process of investigating a burglary which had occurred days earlier at the Cash Club. Phonograph records owned by Club disc jockeys were among the stolen property. (A. 822, L. 5-18). Pope had Douglas Powdrill (Powdrill hereinafter) a casual employee of the private club whom Pope suspected of involvement in the burglary, at the Club for questioning. (A. 977, L. 5-9) Pope wanted Det. Dlubak, his friend and ex-coworker, to "scare" Powdrill into talking. (A. 858, L. 18-19).

Det. Dlubak, upon approaching the Club, saw Everhardt Flenory, Pope's brother, whom Det. Dlubak knew had in the past been arrested on drug and firearms related charges. (A. 973, L. 18-25; A. 974 L. 1-7). Det. Dlubak, at this time, also must have known about Pope and Pope's relatives' reputations for beating people up.* Also, the Cash Club had a

* Fellow police officer Harvey testified that Pope had a reputation for beating people up. (A. 273, L. 1-23). Patrick stated that the Flenory's had a reputation for being ruffians, bullies and people likely to resort to physical violence (A. 96, L. 5-18), and that the Cash Club had a bad reputation. (A. 95, L. 21-25; A. 86, L. 1-4). Sherry Coover stated that Pope and his son, Chinky, had a reputation for beating up people. (A. 637, L. 2-7). Also, 15 witnesses testified about violent incidents involving Pope and/or his relatives which were reduced to written police incident reports which Det. Dlubak in his official capacity, had read (A. 960, L. 11-12), and, therefore, Det. Dlubak had to have known of the specific incidents of violence plus Pope's reputation, his relatives' reputation and the Club's reputation.

reputation as a place where many unlawful beatings occurred. Det. Dlubak previously had investigated an incident in which Pope beat and robbed a woman at the Cash Club causing her to be hospitalized for 4 to 5 days. (A. 1114, L. 12-25; A. 1121-1122). An article appeared in the local newspaper about a man Pope had beaten with a black jack, while acting as a New Kensington Police Officer. (A. 270-278).

Inside the Club, dimly lit and not open for business, (it was an "after hours" Club that did not open for business until late at night), Det. Dlubak saw Keith Turner, Chico Rivera, Chinky Flenory (Pope's son), Pope, Powdrill and shadows made by unknown people moving around in the background. (A. 976, L. 7-12; A. 1007, L. 5; A. 1009,

L. 16-22; A. 988, L. 13-20).

As Det. Dlubak started to enter the Club, Powdrill was being beaten up by Ronald DeVaughn. DeVaughn, one of the disc jockeys whose albums were stolen in the burglary (A. 702, L. 16-21), was instructed by others in the Club to stop beating Powdrill at the moment Dlubak was entering the Club. (A. 708, L. 7-21).

Pope and Det. Dlubak spoke. Det. Dlubak thereupon introduced himself to Powdrill as a police officer and questioned Powdrill about the burglary. (A. 976, L. 25; A. 977).

Det. Dlubak witnessed that Powdrill, who had just been in a fight with DeVaughn, had tears in his eyes (A. 980, L. 1-2) and was pleading with Pope. (A. 979, L. 24-25). Pope acknowledged in his testimony that Powdrill was frightened

(A. 861, L.24), shook (A. 861, L. 11-12) and looked distressed and shaken. (A. 863, Ll. 9-13). During the interrogation, this scared, crying and pleading young man, Powdrill, asked Det. Dlubak to take him out of the Club. (A. 133, L. 13-15). Instead of taking Powdrill from the Club, Det. Dlubak left the Club, and just before leaving told Pope: "I guess you can take care of this yourself. I guess you can handle this." (A. 707, L. 9-12).

Det. Dlubak explained to the jury why he failed to take Powdrill from the Club: "Because I am talking to an ex-policeman, and I worked with for 14 years, and I know quite well, and I figure that Mr. Powdrill is in good hands." (A. 981, L. 16-18). Det. Dlubak told Pope to get and talk to Bartender Milton Patrick because

Mr. Patrick may have had keys to the Club. (A. 863, L. 16-24; A. 988-990). Pope told Det. Dlubak that he did not want a written police report about the burglary filed, and, therefore, Det. Dlubak suggested that Pope investigate the burglary alone, without further police involvement. (A. 983, L. 9-17). This was an improper delegation of police duties and responsibilities to a private citizen. (A. 431, L. 14-25; A. 432, L. 1-12). Det. Dlubak wrongfully failed to file a written report as required by law (A. 431, L. 14-25; A. 432, L. 1-12; A. 925, L. 1-15), and wrongfully failed to follow up on the case as is required by regular police procedure. (A. 981, L. 25; A. 982, L. 1-9; A. 985, L. 6-25; A. 986, L. 1-21).

Det. Dlubak has been a detective

since 1970 with extensive training including a 480 hour basic municipal police course and 28 to 30 seminars on topics such as burglary investigation. (A. 958-964).

Upon Det. Dlubak leaving the private club, Pope threw up his hands in a manner interpreted by DeVaughn to mean, "I don't care what youns do to him now to get your albums back." At Pope's direction, DeVaughn and subsequently others brutally beat Powdrill for over 2 hours using baseball bats, iron rods, fists and feet, and interrogated Powdrill about the burglary and the stolen albums. Approximately one-half hour after Det. Dlubak left the Club, Chinky Flenory, Chico Rivera and Keith Turner took Milton Patrick from his home and brought him to the Cash Club, where he was similarly

beaten and interrogated. (A. 100-111). The injuries sustained by Powdrill in the beating resulted in his death later that night. (A. 131, L. 25; A. 132, L. 1-24).

These beatings occurred in the middle of the afternoon on a normal business day within the confines of the Central business district of the City of New Kensington. The New Kensington Police Substation was located on the same street as the Cash Club and less than a block away. Two individuals, one of whom was Powdrill's nephew, entered the Club near the end of the beatings and saw Powdrill and the serious condition he was in. The two individuals left the Club and saw New Kensington Police Officer Robert Kowalkowski (Off. Kowalkowski hereinafter) near the Police Substation. Powdrills's nephew informed Off.

Kowalkowski that he needed assistance at the Club, "his uncle had been beat up bad." (A. 654, L. 17-19). Off. Kowalkowski and New Kensington Police Lieutenant Joseph Mangione (Lt. Mangione hereinafter) then went to the building which housed the Cash Club. Ronald DeVaughn was standing just outside the Club with blood on his shirt and pants that was plainly visible. (A. 661, L. 19-25). Off. Kowalkowski and Lt. Mangione went into the building and rang the buzzer at the entry to the Club. Pope opened the door exposing a white wall with blood on it. (A. 105-106). Off. Kowalkowski and Lt. Mangione mentioned to Pope a report of a beating there. (A. 875, L. 13-15). Pope responded that the beating was over. (A. 875, L. 15-16). Off. Kowalkowski and Lt.

Mangione made no further inquiry. They exited the building, passing Powdrill's nephew on their way out without saying a word to him. (A. 657). About one-half hour later, Powdrill was carried from the Cash Club and taken to the Hospital by his nephew and others.

Thus, there was substantial evidence presented at trial of conduct more culpable than negligence. In addition, the trial court's charge prohibited the jury from finding liability premised on negligence:

> You may not find an individual defendant liable if you conclude that his conduct was negligent. The law does not permit a plaintiff to recover for a violation of a constitutional right which was the result of negligent conduct. (A. 589).

In reviewing this case, the United

States Court of Appeals for the Third Circuit denied oral argument and issued a very short Memorandum Opinion, not for publication, authored by Chief Gibbons that affirmed the Trial Court. The Third Circuit found that "Dlubak could reasonably foresee serious harm befalling Powdrill." (A-3). Neither the City of New Kensington or Officer Dlubak requested a rehearing.

II. THIS COURT HAS PREVIOUSLY DECIDED THAT, IN SOME CASES, THERE IS A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983 FOR FAILURE TO PROTECT

Petitioners argue that this Court has not yet decided whether a law enforcement official's failure to act to prevent a crime can state a claim under 42 U.S.C. Section 1983. However, in Martinez v.

California, 444 U.S. 277, 284-285 (1980) this Court determined that a cause of action for failure to protect is possible in some cases. In Martinez the Court rejected the Section 1983 claim of the family of a 15 year old girl murdered by a parolee. The girl's family had sued the state officials who paroled him 5 months before her murder. This Court found the girl's death "too remote a consequence of the parole officer's action to hold them responsible under federal civil rights law," but indicated the result could have been different if the parole board were aware that this girl, "as distinguished from the public in general, faced any special danger." 444 U.S. 277, 284-285. The Third Circuit determined that Det. Dlubak was aware that Douglas Powdrill faced a special

danger.

III. NEITHER THE SPECIAL RELATIONSHIP OR THE NEGLIGENCE ARGUMENTS OF PETIONERS WERE RAISED BEFORE THE COURT BELOW

the Brief filed by the Petitioners in the United States Court of Appeals for the Third Circuit, only two issues were raised. First, the Petitioners argued that the "prevailing view" required proof of a "special relationship" (as defined in Estate of Bailey v. County of York, 768 F.2d 503 (3rd Cir. 1985)) between Douglas Powdrill and the New Kensington Police. Since the Third Circuit found that such a special relationship was proven, the Petitioners have now switched the argument in the Petition for Writ of Certiorari to raise, for the first time, the claim that the special relationship

test is improper (See Petition for Writ of Certiorari, pages 12 and 13).

The second issue raised before the Third Circuit was a claim of insufficient evidence that the policy of nonenforcement of the laws in private clubs caused the death of Douglas Powdrill. Another issue Petitioners now seek to raise, that the conduct of Det. Dlubak amounted only to negligence, was not argued to the Third Circuit.

IV. THIS IS NOT A "FAILURE TO RESPOND" OR A "FAILURE TO PROVIDE ADEQUATE POLICE PROTECTION" CASE

It is argued in the Petition for Writ of Certiorari that the Third Circuit's decision in this case would allow "a victim who identifies himself in a hurried call to a distant police station

[to set] the stage for recovery when the police do not timely respond to his call for help." PETITION FOR WRIT OF CERTIORARI, p. 13. The instant case, however, is not a case where police failed to timely respond to a call. Det. Dlubak responded to the call by going to the Cash Club, "could reasonably foresee serious harm befalling Powdrill "(A-3), but nevertheless walked out of the Cash Club without caring what would happen to Mr. Powdrill.

The Petitioners also attempt to equate this case with those where the victim is a member of the general public injured because of an alleged policy of inadequate police protection (See, e.g., Reiff v. City of Philadelphia, 471 F. Supp. 1262 (E.D. Pa. 1979) cited at Pages 10 and 11 of the Petition for Writ of

Certiorari). However, Powdrill was not just a member of the general public. Det. Dlubak knew he faced a "special danger" under Martinez v. California, supra in the "good hands" of "Pope" Flenory and his gang. Even under the narrow view taken by the United States Court of Appeals exemplified by DeShaney v. Winnebago County Department of Social Services, 812 F.2d 298 (7th Cir. 1987), cert. granted, ------U.S.------, 108 S.Ct. 1218 (1988), this case would withstand scrutiny. The Seventh Circuit requires proof that the Defendant's conduct increased the probability of the victim's injuries. 812 F.2d 298, 302. In the case at bar, the conduct of the City of New Kensington and Det. Dlubak increased the probability of Douglas Powdrill's injuries in at least two ways.

Under New Kensington policy, if there was a disturbance in a private club, the police did not enter into those clubs (A. 916, L. 6-10); private clubs were to handle their own disturbances, like a fight or something, and only if it came onto the public street would the police take charge. (A. 917, L. 20-25). (Remember, at the time Det. Dlubak entered the Club he did so because he had been summoned by Pope to talk, not for the purpose of investigating a burglary). When people were beaten in private clubs in New Kensington on various occasions and reported the incidents to the New Kensington Police, they never heard from the New Kensington Police again. (A. 34-42; A. 227-231; A. 301-302; A. 308-309). As a result, private club operators, such as Pope

Flenory, and their employees, beat people freely without fear of prosecution. Hence, the increase in the probability of Douglas Powdrill being injured.

Second, Det. Dlubak increased the probability of Powdrill's injuries by leaving him in Pope's custody with instructions to Pope to take care of the situation himself. Under the circumstances, such a direction was tantamount to authorization to continue the beating of Powdrill.

V. THE THIRD CIRCUIT'S DECISION IS NOT IN CONFLICT WITH ANY OTHER CIRCUIT

After stating in the Brief filed in the United States Court of Appeals for the Third Circuit that the Third Circuit's special relationship test was

"the prevailing view," Petitioners now argue that its application to the case at bar has created a conflict among the circuits. PETITION FOR WRIT OF CERTIORARI, Pages 9 through 13. Petitioners attempt to compare this case to Escamilla v. City of Santa Ana, 796 F. 2d 266 (9th Cir. 1986). In that case, the Court dismissed a claim that a woman's shooting death in a bar resulted from the failure of two undercover police to intercede in a fight between two other bar patrons. However, unlike Dlubak, the two police in Escamilla did not just leave the bar when trouble was imminent. They radioed for uniformed backup assistance. In addition, the victim in Escamilla had not been questioned by the police and had not asked for them to take her from the bar.

Most of the Circuit Courts of Appeal that have addressed the issue have adopted the special relationship test to some degree. See, e.g., Doe v. New York Department of Social Services, 649 F.2d 134 (2d Cir. 1981) cert. denied, 464 U.S. 864 (1983); Jensen v. Custis, 747 F.2d 186 (4th Cir. 1984); Escamilla v. City of Santa Ana, 796 F.2d 266 (9th Cir. 1986); Humann v. Wilson, 696 F.2d 783 (10th Cir. 1983); Wright v. City of Ozark, 715 F.2d 1513 (11th Cir. 1983). It is only the Seventh Circuit, in DeShaney, that has rejected the special relationship test. The Seventh Circuit requires proof that the conduct in question increased the risk of the injuries ultimately sustained by the victim. 812 F.2d 298, 302. As has already been pointed out above, the conduct of the City of New Kensington and

Det. Dlubak did increase the risk of Powdrill being injured. In addition, the Trial Court's charge to the jury that the conduct must be a "substantial factor" in bringing about the injury (A. 589), removed any possibility that the risk of injury to Powdrill was not increased by the conduct of the Petitioners.

VI. THERE IS SUBSTANTIAL EVIDENCE OF THE REQUISITE CAUSAL CONNECTION BETWEEN THE POLICY AND THE DEPRIVATION

In their Petition for Writ of Certiorari, the Petitioners argue that this Court should use this case to clarify the necessary causal connection between the policy and the deprivation. PETITION FOR WRIT OF CERTIORARI, Pages 14 through 17. However, Petitioners acknowledge and do not object to the well-accepted rule requiring proof that

the constitutionally offensive acts are taken in furtherance of the policy. PETITION FOR WRIT OF CERTIORARI. Page 15.

There is abundant evidence that the actions of Det. Dlubak were in furtherance of the policy of disregarding violence in private clubs. Det. Dlubak, instead of questioning bartender Milton Patrick himself, had Pope do it, and had Pope otherwise handle the investigation. (A. 707, L. 9-12; A. 863, L. 16-24; A. 988-990). Det. Dlubak, upon request of the operator of the private club, Pope, did not make a police report of the burglary there. (A. 983, L. 9-17). Mamie Horton produced expert testimony that these were not proper police practices. A. 426-432). Det. Dlubak admitted that the New Kensington Police

did not like to go into private clubs, and that he did not know whether arrests in private clubs were valid. (A. 969, L. 1-9; A. 970 L. 11-15). Fellow Officer Veltri testified that the City of New Kensington Police Manual, with the policy stating that arrests in private clubs are invalid, meant that if there were a disturbance in a private club, the police did not enter into those clubs (A. 916, L. 6-10). Officers Mangione and Kowalkowski, after being informed Powdrill had been beat up in the Cash Club, after seeing a man just outside the club with blood on his shirt and pants, and after seeing blood on the wall just inside the Club, failed to enter the Club or take any action. (A. 654, 661, 105-106, 875, 657). Finally, several witnesses testified to having been beaten

in private clubs, reporting the incidents to the New Kensington Police, and then never hearing from them. (A. 34-42; A. 227-231; A. 301-302; A. 308-309).

The Petition for Writ of Certiorari points out that Det. Dlubank denied his conduct was affected by the Cash Club being a private club. PETITION FOR WRIT OF CERTIORARI, Page 16. However, if an admission of the actor were required as proof that his actions were taken in furtherance of a particular policy, the resultant burden would be almost impossible. This statement by Dlubak that his conduct was unaffected by the Cash Club being private is totally self-serving (in that it goes directly to the issue of liability of his employer). It was within the province of the jury to determine whether Det. Dlubak

was telling the truth.

The City and Det. Dlubak attempt to analogize the case at bar to Milligan v. City of Newport News. 743 F.2d 227 (4th Cir. 1984). In that case, unlike the case at bar, the policy pleaded by the Plaintiff was inadequate police training. The U.S. Supreme Court has questioned whether inadequate police training can be a policy or custom under 42 U.S.C. Section 1983. City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985). The problem with establishing the causal link between police actions and a policy of inadequate training in Milligan is that such a policy does not direct a police officer to take or not take specific action (in Milligan police negligently moved an automobile accident victim's body thereby exacerbating a spinal injury

suffered in the accident). In the case at bar, however, the policy specifically directed police to not arrest in private clubs, to stay away from private clubs and to not intercede in fights occurring in them.

As the Court in Milligan stated, the policy "must be of such a character that municipal employees could reasonably infer from it tacit approval of the conduct in issue." 743 F.2d at 230. Dlubak's conduct in leaving the private club with Powdrill's beating imminent was tacitly approved by the policy that directed police to not arrest in private clubs, to stay away from private clubs and to not intercede in fights in them. The jury properly found that Det. Dlubak's acts were taken in furtherance of this Municipal Policy.

VII. LIABILITY OF A PERSON IN AN OFFICIAL CAPACITY WITHOUT LIABILITY IN AN INDIVIDUAL CAPACITY DOES NOT CREATE A CONFLICT WITH PRIOR CASES

The jury determined that the City of New Kensington and Det. Dlubak, in his official capacity, were liable to Ms. Horton for $65,899.00. The jury found that Det. Dlubak was not liable to Ms. Horton in his individual capacity. Petitioners argue that these jury findings conflict with prior cases such as City of Los Angeles v. Heller, 475 U.S. 796 (1986). In City of Los Angeles v. Heller, this Court held that, because the jury found that the police officer involved did not use excessive force, the Municipality's policy authorizing use of excessive force was irrelevant. The case

at bar is far different. Because the jury found Det. Dlubak left the Cash Club when he could reasonably foresee serious harm befalling Powdrill, the issue of whether such inaction was in furtherance of the Municipal policy of not interceding in violence at private clubs was properly submitted to the jury.

CONCLUSION

The facts of this case, when viewed in the proper manner, and taken together with the applicable law demonstrate that this is not an appropriate case for granting Certiorari. It is not a case where liability under Section 1983 was premised on negligent conduct. The issue of whether there can be a cause of action under Section 1983 for failure to protect

has previously been answered in the affirmative by this Court. The Petitioners did not raise before the Third Circuit two arguments raised in the Petition for Certiorari, the impropriety of the special relationship test and the claim that Det. Dlubak's conduct only amounted to negligence. The facts of this case show it is neither a failure to respond or a failure to provide adequate police protection case. The decision of the Third Circuit in this case does not conflict with any other circuit. There was substantial evidence that the policy of nonintervention into beatings at private clubs caused Douglas Powdrill's death. Finally, the imposition of liability upon Det. Dlubak in an official capacity but not in an individual capacity does not conflict with any prior

cases.

The rulings of the United States District Court for Western District of Pennsylvania and Third Circuit Court of Appeals were correct. They should be left standing through denial of Certiorari.

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